IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-950

* * *

COLLECTION CONSULTANTS, INC. AND STELLA THORNTON,

Appellants

V.

THE STATE OF TEXAS,

Appellee

* * *

On Appeal From The Court of Criminal Appeals of Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Criminal Appeals of Texas on the grounds that is manifest that the questions on which the decision of the court depends are so unsubstantial as to require no further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the Texas Penal Code, i.e., 1974 V.T.C.A., Penal Code, Section 42.07 (a)(2), which provides:

> (a) A person commits an offense if he intentionally:...
>
> (2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient;...
>
> (c) An offense under this section is a Class B misdemeanor.

The requisite culpable mental states are defined in 1974 V.T.C.A., Penal Code, Section 6.03:

> (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exists. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

> (c) A person acts recklessly, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

B. The Proceedings Below

The Appellant Stella Thornton, an agent of Appellant Collection Consultants, made several telephone calls to Ervin O. Grice concerning a debt that Grice allegedly owed Shamrock Oil Company. The first phone call was received from Mr. Grice at work at 4:00 p.m. on July 15, 1974, at which time Grice informed Appellant Thornton that according to his records he did not owe Shamrock Oil Company the amount of money demanded and that he could prove his claim in court. Four days later, Grice received six telephone calls from Appellant Thornton and two calls from another employee of Collection Consultants. Then a mere two days later Grice received a series of four phone calls from Appellant Thornton. The next day, Grice received three phone calls from Appellant Thornton within a ten minute period and another phone call from a second employee of Appellant Collection Consultants. Later, that same day, Grice received three additional calls from Appellant Thornton within a half hour period and a second call from another employee of Collection Consultants. Although Appellant Thornton used different names in talking to Mr. Grice, Mr. Grice testified that the voices were one and the same. Additionally, Mr. Grice tape recorded all eight calls which he received on the last day. On each occasion, Grice informed Appellant

Thornton that he had paid the debt in question and finally called Appellant Thornton's attention to the fact that he believed her to be violating the law by continuing to call him, to which she replied, "Yeah, I'm going to continue to call you, Mr. Grice, until you send me that check." The Appellants were prosecuted in a joint trial and each was convicted of the offense of harassment by the use of a telephone.

Contending, among other grounds, that Section 42.07(a)(2) was unconstitutional as violative of the First Amendment, the Appellants pursued a direct appeal to the Texas Court of Criminal Appeals. Their convictions were originally reversed on the basis of an unassigned error; however, on the State's Motion for Rehearing, the convictions were affirmed. *The State of Texas v. Collection Consultants, Inc. and Stella Thornton*, 556 S.W.2d 787.

II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The precursor of Section 42.07(a)(2) was Article 476 of the former Penal Code.[1] The constitutional validity of that statute was first upheld by the Texas courts in *Alobaida v. State*, 433 S.W.2d 440 (Tex.Crim.App. 1968), *cert. denied* 393 U.S. 943 and was subsequently affirmed until the enactment of the present Penal Code.[2]

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[1]Article 476 of the former Penal Code provides in pertinent part:

> "Whoever ... uses any telephone in any manner with intent to harass, annoy, torment, abuse, threaten or intimidate another, except if such call be for a lawful business purpose, shall be guilty of a misdemeanor..."

[2]*LeBlanc v. State*, 441 S.W.2d 847 (Tex.Crim.App. 1969); *Schuster v. State*, 450 S.W.2d 616 (Tex.Crim.App. 1970).

In upholding the instant conviction, the Texas high court correctly evaluated Appellants' claim both in light of those cases upholding the validity of the former law and in light of recent decisions of this Court addressing attempts to curtail protected First Amendment freedoms.

Appellants contend that the decision of the Texas Court of Criminal Appeals ignores this Court's decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Appellants argue *Coates* holds that a city ordinance prohibiting conduct "annoying" to persons is vague and overbroad and that it therefore contravenes the constitutional right of freedom of speech. The statute involved in *Coates* provided in pertinent part: "It shall be unlawful for three or more persons to assemble except at a public meeting of citizens, on any of the sidewalks, corners, vacant lots, or alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." In striking down the ordinance as unconstitutional on its face, this Court found it to be unconstitutionally vague because it subjects the exercise of the right to assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

In discussing the term "annoying" as it appears in the ordinance, this Court noted:

> "Conduct that annoys some people does not annoy the others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at it meaning."

Coates, supra, 402 U.S. at 614.

Appellants argue that since the words "annoy" and "alarm" are not defined in the Texas Penal Code, then the statute in question leaves the public uncertain about the conduct that is prohibited. It is Appellants' position that "assertive language may be necessary for the collèction of debts which are long past due" (Appellants' Jurisdictional Statement at 7) and that such language may be "alarming" to some recipients.

However, contrary to Appellant's assertions, Section 42.07(a)(2) does not suffer from lack of notice to potential offenders. The statute is plainly directed not to *any* First Amendment telephone conversation which the listener finds annoying or alarming, but to those communications which *threaten* to take *unlawful action* against the recipient, thereby annoying or alarming the listener. Clearly the statute is specific enough to give a person of ordinary intelligence fair notice that his contemplated conduct of threatening another with unlawful action by telephone is forbidden as harassment by statute. As noted in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), citing *Lanzetta v. New Jersey*, 306 U.S. 451, greater leeway is allowed in the field of regulatory statutes concerning business activities where the acts limited are in a more narrow category. The statute in question does not plainly forbid annoying telephone conversations, only those telephone conversations conveying a threat to take unlawful action which alarm the recipient. In an age of increasing use of telephonic communications as a debt collecting device, the State certainly has an interest in restricting wanton harassment even though it involves First Amendment constitutionally protected conduct.

Appellants also urge that the unconstitutionality of the statute is magnified in that it enables the listener

himself to determine if the caller commits a crime. Apparently Appellants are analogizing the provision of this harasment statute with the unfettered discretion placed in the hands of the Jacksonville Police by the vagrancy statute in *Papachristou*, supra. Appellants argue that Section 42.07(a)(2) does not provide a readily ascertainable standard of guilt and thereby leads to conjecture of what conduct may subject an actor to criminal prosecution. By taking that position, Appellants ignore those statutes which for example define the aggravating element of the underlying felony in terms of the victim's preception of the danger he is in. Similarily, statutes attempting to define such elusive offenses as obscenity, public lewdness, and indecency are often drafted with the emphasis placed on the viewer's *preception* of and reaction to the act rather than on the act standing in isolation. Moreover, the requisite culpable mental state so fully defined in 1974 V.T.C.A., Penal Code, Section 6.03 is an essential element of every harassment offense and focuses upon the mental state and intent of the actor, not the reaction of the recipient. The statute under review is a constitutionally permitted regulation of that speech which conveys a threat of unlawful action and causes alarm.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as require no further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in these causes by the Court of Criminal Appeals of Texas.

Respectfully submitted,

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PROOF OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of Texas and a member of the Bar of this Court, hereby certify that a copy of Appellee's Motion to Dismiss or Affirm has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, this ___ day of April, 1978, addressed to attorney for Appellant, Robert B. Cousins, 3100 First National Bank Building, Dallas, Texas 75202.

JOE B. DIBRELL, JR.
Assistant Attorney General